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IN THE
Supreme Court of the United States

STATE OF OREGON,
Petitioner,

v.

RANDY LEE GUZEK,
Respondent.

On Writ of Certiorari to the
Supreme Court of Oregon

BRIEF OF THE STATES OF ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Franklin v. Lynaugh*, this Court concluded that a capital defendant does not have a constitutional right to an instruction telling the jury in the penalty phase to consider "residual doubt" about defendant's guilt. Most state and federal appellate courts have relied on *Franklin* to conclude that a capital defendant has no constitutional right to offer evidence and argue in a penalty-phase proceeding that he should receive a sentence less than death because he continues to assert his innocence of the underlying crime. The Oregon Supreme Court, however, held in this case that a capital defendant has a federal constitutional right to present in a penalty-phase proceeding alibi evidence that casts doubt on his guilt. The question presented is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim – that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

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INTEREST OF AMICI CURIAE

Each of the amici States employs the death penalty, in appropriate circumstances, as a means of punishing society's vilest offenders. As a matter of public policy, some of the amici here may choose (either now or in the future) to permit convicted capital-murder defendants to argue "residual doubt" to sentencing juries. Others have chosen (or someday will choose) not to allow such arguments. But amici are united in believing that States ought to be able to make that policy choice for themselves and that the Eighth Amendment should not be construed to impose a wooden, across-the-board rule requiring the admission of residual-doubt arguments.

STATEMENT

Having already been convicted of the capital murders of Rod and Lois Houser, respondent Randy Lee Guzek proposed to present at his sentencing hearing – purportedly as "mitigating" evidence – an alibi that would have put him somewhere other than the victims' home at the time of the killings. In other words, notwithstanding the fact that he had already been found guilty of the murders, Guzek sought to prove at sentencing that, in fact, he hadn't committed them. The trial court excluded Guzek's alibi-based "residual doubt" evidence as irrelevant to any issue that remained open on sentencing. The Oregon Supreme Court reversed and remanded for resentencing. As relevant here, the court held that Guzek had a federal constitutional right – grounded in the Eighth Amendment – to present his residual-doubt argument to the sentencing jury.

That holding is misguided and should be reversed.

SUMMARY OF ARGUMENT

The Oregon Supreme Court's decision – that a defendant, having already been convicted of capital murder, has an Eighth Amendment right to re-argue his innocence to his sentencing jury – finds no support either in this Court's case law, in history, or in logic, and entails significant practical costs. It should be rejected.

1. The plurality and concurring opinions in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), show the error of the Oregon court's decision. Although technically deciding the case before it on another basis, the *Franklin* plurality emphasized that nothing in this Court's decisions "suggest[s] that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase" and, further, that existing precedent "fail[s] to recognize a constitutional right to have such doubts considered as a mitigating factor." *Id.* at 173-74 (emphasis in original). Concurring in *Franklin*, Justices O'Connor and Blackmun would have gone farther and held squarely that "the Eighth Amendment does not require" States to permit defendants to make (or juries to consider) residual-doubt arguments. *Id.* at 187 (O'Connor, J., concurring). The Oregon court's backhanded dismissal of *Franklin* – in a brief footnote appended to the last sentence of its discussion – is, with respect, inexplicable.

2. The Oregon Supreme Court's decision constitutionalizing residual doubt goes a long way (if not quite all the way) toward increasing the prosecution's burden of proof in capital cases from the familiar "beyond a reasonable doubt" standard to something like a "beyond *all possible* doubt" standard. The history of the reasonable-doubt standard does not justify that departure, for two reasons. *First*, the reasonable-doubt standard arose in the late eighteenth century in response to the Enlightenment view that absolute certainty in human endeavors is

unattainable. Against that backdrop, a determination of guilt "beyond a reasonable doubt" reflects the highest degree of certainty possible in human affairs and signifies to the community that the defendant is – in fact – guilty. Historically, then, "beyond a reasonable doubt" is as stringent a standard as can practicably be implemented; there is no room for a higher threshold. *Second*, the reasonable-doubt standard was originally employed exclusively (or at least particularly) in capital cases. Thus, while some modern scholars have urged extra protection – over and above the reasonable-doubt standard – for capital cases, in fact, the reasonable-doubt standard *is* the extra protection for capital cases.

3. There is also no basis in logic for a rule that envisions a capital defendant asking a sentencing-phase jury to conclude that he may well not be guilty of the crime for which the guilt-phase jury has already convicted him. As an initial matter, it is worth noting that any doubt that exists on the other side of the certainty "beyond a *reasonable* doubt" required for conviction is, by definition, *unreasonable* – *i.e.*, "irrational," "absurd," "inappropriate," and "incongruous." The Court should be slow to cement into the Constitution a rule that would free jurors to make life-and-death decisions based on unreasonable hunches and impulses. Moreover, although the reasonable-doubt standard guides a jury's determination of guilt – and in some philosophical sense may permit conviction on something less than absolute certainty – once the jury's determination is reduced to a verdict, the law treats the defendant as "Guilty" *in fact*: he did it, he intended to do it, he caused the harm, etc. A residual-doubt argument literally invites the jury to undo (or to ignore, or to compromise) – and makes something of a mockery of – its solemn verdict that the defendant is "Guilty."

4. A uniform national rule requiring States to permit consideration of residual-doubt arguments would entail significant real-world costs. First, there is the confusion

that would almost certainly arise in the minds of some jurors when faced with (i) a verdict that the defendant is indeed "Guilty" of the crime charged and (ii) an argument that, on second thought, maybe the defendant isn't guilty, after all. Second, there are very real costs to requiring a prosecutor who as already established a defendant's guilt during the guilt phase of a capital trial to re-establish it for purposes of sentencing. Reconstructing a guilt-phase case would likely entail, among other things, re-calling numerous witnesses – some of whose memories may have faded, others who may not longer be available to testify at all.

ARGUMENT

There is of course no dispute that, under this Court's decisions, the Due Process Clause requires that a State prove a criminal defendant's guilt "beyond a reasonable doubt." *See In re Winship*, 397 U.S. 358, 361-64 (1970). Notwithstanding the severity of the penalty faced by a defendant in a capital-murder case, that standard of proof does not change. Indeed, in establishing the reasonable-doubt standard as a federal constitutional requirement, the Court in *Winship* repeatedly described it as applicable (generically) in all "criminal" cases, *see id.* at 361, 362, 363, 364, and, in fact, quoted for support its earlier decision in *Davis v. United States*, 160 U.S. 469, 488 (1895), for the proposition that "[n]o man should be *deprived of his life* under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them ... is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged," 397 U.S. at 363 (emphasis added); *accord id.* at 362 (citing *Leland v. Oregon*, 343 U.S. 790, 795 (1952), a capital-murder case, as precedent for reasonable-doubt standard).

The Oregon Supreme Court's decision permitting a defendant to introduce "residual doubt" evidence during the penalty phase of his capital-murder case – and following a determination of guilt beyond a reasonable doubt – boldly moves in the direction of raising the standard of proof, such that a State must prove its case *beyond all possible doubt* in order to obtain a death sentence. Several commentators have urged precisely that result in one form or another. *See, e.g.*, Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 Chi.-Kent L. Rev. 1359 (2003); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41 (2001). These proposals – variously requiring "no doubt" or proof "beyond any doubt" – may or may not make sense as a matter of public policy. And, of course, individual States are free to authorize the consideration of residual-doubt evidence in capital-sentencing hearings, either by state statute or by judicial construction of a state constitutional provision.[1]

The question here, though, is different. The question here is whether the Eighth Amendment to the United States Constitution of its own force requires *every State in the union* to allow the consideration of residual-doubt evidence, and thus (practically speaking) to ratchet up the standard of proof in capital cases. It does not. Indeed, as we will show, Guzek's call for further constitutionalization of state criminal procedure finds no support either in this Court's precedent or in the history or logic of the reasonable-doubt standard. It should be rejected.

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[1] *See, e.g., State v. Thomas*, 158 S.W.3d 361, 403 (Tenn. 2005); *People v. Musselwhite*, 954 P.2d 475, 510 (Cal. 1998); *Taylor v. State*, 404 S.E.2d 255, 262 (Ga. 1991).

I. There Is No Basis in This Court's Precedent for Constitutionalizing Residual Doubt.

This Court's case law pertaining to the question presented is remarkably straightforward, and Oregon's thorough doctrinal analysis (Oregon Br. 20-34) persuasively makes the case against Guzek's position. Accordingly, we provide only a *Cliffs Notes* version. As Oregon's brief correctly points out, the plurality and concurring opinions in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), essentially resolve the issues here. *See* Oregon Br. 29-34. To reverse the Oregon Supreme Court's decision, this Court need only reaffirm – and formalize – what it said in *Franklin*.

By way of background, the notion of "residual doubt" came to the fore initially in *Lockhart v. McCree*, 476 U.S. 162 (1986), a case about the "death qualification" of jurors. There, while discussing the use of "unitary juries" in capital cases, this Court noted in passing "the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." *Id.* at 181. Seeking to capitalize on that remark, the petitioner in *Franklin* argued that it entitled him to a charge instructing the sentencing-phase jury to reconsider his guilt – specifically, to rethink whether he was actually the murderer, whether he actually caused the victim's death, and whether actually he had the requisite intent to kill. 487 U.S. at 172. The *Franklin* Court rejected his argument, and in the process, came close to resolving the question presented in this case.

"At the outset," the plurality in *Franklin* emphasized that the Court had never held, in *Lockhart* or elsewhere, "that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation." *Id.* at 172-73. All that the *Lockhart* dicta stood for, the plurality

said, was "the simple truism that *where* 'States are willing to go to allow defendants to capitalize on "residual doubts,"' such doubts will inure to the defendant's benefit." *Id.* at 173 (emphasis in original). More to the point for present purposes, the *Franklin* plurality stressed that "*Lockhart* did not endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase." *Id.* (emphasis in original); *see also id.* at 174 (using scare quotes to refer to claimed "right" to have jury consider residual doubt). And, indeed, the plurality decision pointed out the fact that the Court had "not struck down the practice in some States of prohibiting the consideration of 'residual doubts' during the punishment trial." *Id.* The *Franklin* plurality summed up in a way that – at least as a matter of existing doctrine – would seem to foreclose Guzek's claim here:

> Our edict that, in a capital case, "'the sentencer . . . [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,'" in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts over a defendant's guilt." Such lingering doubts are not over any aspect of a petitioner's "character," "record," or a "circumstance of the offense." *This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.*

Id. at 174 (citation omitted and emphasis added). Having said all of that, the *Franklin* plurality ultimately concluded that, in any event, the trial court's rejection of the defendant's proposed jury instructions did not prejudice his ability to argue – or the jury's ability to consider – the residual-doubt issue.

Joined by Justice Blackmun in a concurring opinion, Justice O'Connor would have gone farther and squarely rejected the contention that the Eighth Amendment requires States to permit residual-doubt arguments. "In [her] view," the condemned's residual-doubt claim "fail[ed], not because the Texas scheme allowed for consideration of 'residual doubt' by the sentencing body, *but rather because the Eighth Amendment does not require it.*" *Id.* at 187 (emphasis added). The Court's cases, Justice O'Connor said, simply "do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt." *Id.* Perceptively, Justice O'Connor observed that a residual-doubt claim (however packaged) is tantamount to an argument "that the States must permit capital sentencing bodies to demand proof of guilt to 'an absolute certainty' before imposing the death sentence." *Id.* at 188. "Nothing in [the Court's] cases," she said, "mandates the imposition of this heightened burden of proof at capital sentencing." *Id.*

Together, the plurality and concurring opinions in *Franklin* put the writing on the wall for all to see: Whatever individual States may choose to do as a matter of public policy (or even as a matter of state constitutional law), the Eighth Amendment does not in and of itself require them to permit capital defendants to argue residual doubt to sentencing-phase juries. The Oregon Supreme Court's backhanded treatment of *Franklin* is, with respect, puzzling. Having spent pages and pages of analysis trying to tease a residual-doubt right out of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Bell v. Ohio*, 438 U.S. 637 (1978) – decisions it conceded were distinguishable (Pet. App. 57-58) – as well as out of the specific facts of *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), the Oregon court relegated *Franklin* to a footnote appended to the very last sentence of its analysis. All the Oregon

court had to say about *Franklin* was that "a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any residual or lingering doubts remaining from the guilt phase" but that, in its view, *Franklin* did not "lessen[] the direction" from *Lockett*, *Bell*, and *Green* that the Eighth Amendment does require that a defendant be permitted to *introduce* residual-doubt evidence. Pet. App. 62-63 (emphasis in original).

There are two fundamental problems with the Oregon Supreme Court's attempted distinction. First, the court's characterization of the opinions in *Franklin* seems to us incorrect. A more accurate summary – supported by the quotations above – would be that the *Franklin* plurality "strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require" *States to permit "consider[ation]" residual-doubt evidence at all. See* 487 U.S. at 174 (plurality); *id.* at 187 (O'Connor, J., concurring). Second, as the dissenting judges below emphasized, it is simply "impossible to imagine" how the plurality and concurring opinions in *Franklin* "could say what they said" if the Oregon court's reading of *Lockett*, *Bell*, and *Green* – all of which pre-date *Franklin* by nearly a decade – were correct. Pet. App. 71-72. (Tellingly, the *Franklin* opinions do not so much as mention *Green*, the decision the court below thought the surest source of a residual-doubt right.)

It seems to us inarguable that the clearest (and most recent) signal is *Franklin*, and we urge the Court to reaffirm what it said there.

II. There Is No Basis in the History of the Reasonable-Doubt Standard for Constitutionalizing Residual Doubt.

There is also no historical basis for minting, as a matter of federal constitutional law, a new standard of proof

in capital cases: "beyond any doubt" (or "no doubt") in place of the familiar "beyond a reasonable doubt." (As noted above, Guzek's residual-doubt position certainly tends strongly in that direction. *See supra* at 4-5.) The origins of the reasonable-doubt standard are, frankly, a little hazy. Before its advent, there was no formal standard of proof in criminal cases, and "it was generally assumed that juries were to return true verdicts." Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 48 (2005) (hereinafter Lillquist, *Absolute Certainty*). Some scholars trace the reasonable-doubt standard to the so-called Irish Treason Cases.[2] *See, e.g.*, Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 981-82 (1993). Others date the standard's appearance somewhat earlier, to prosecutor Robert Treat Paine's argument in the Boston Massacre trials of 1770. *See, e.g.*, Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1191 (2003). In either event, there are two historical points worth noting here.

First, "[c]oncern about the requisite level of juror certainty for a criminal conviction arose around the same time as Enlightenment thinkers became concerned with the ability of humans to obtain certainty in any endeavor, but in particular in scientific matters." Lillquist, *Absolute Certainty*, *supra*, at 48. The notion of reasonable doubt, like that of "moral certainty," "'accorded with [these] contemporary views about the nature of judgment,'" *id.* at 49 (quoting Sheppard, *supra*, at 1192), and, more specifically, "developed against [the] philosophical understanding that true absolute certainty is impossible," *id.* at 74. In other words, the reasonable-doubt standard "was originally understood to capture the highest degree of

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[2] *Finney's Case*, 26 How. St. Tr. 1019 (Ir. 1798); *Bond's Case*, 27 How. St. Tr. 523 (Ir. 1798).

certainty possible in human affairs." *Id.* at 73. A jury's determination that a defendant was guilty "beyond a reasonable doubt," that is, meant (allowing for the unattainability of perfect knowledge) that the defendant was – *in fact* – guilty.

The second historical point is this: In its origin, the reasonable-doubt standard was a protection developed specifically for capital cases; indeed, "the early life of the reasonable-doubt instruction appears to be limited *solely* to capital trials." Sheppard, *supra*, at 1195 (emphasis added); *accord* 9 *Wigmore on Evidence* §2497, at 405 (Chadbourne rev. 1981) (standard was "applied first only in capital cases"). Specifically, scholars seem to agree that the rise of the reasonable-doubt standard was tied directly to increasing public discomfort with the imposition of the death penalty for relatively minor crimes:

> [T]he standard began to take shape at a time when "the penal code of England was a fearfully bloody code. Death, without benefit of clergy, was denounced against a multitude of misdoings which would now be considered, if offences at all, offences of a comparatively trivial character. The consequences of conviction to the unfortunate prisoner were not only fearful, but they were irremediable."

Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. Davis L. Rev. 85, 148-49 (2002) (quoting Hon. John Wilder May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 Am. L. Rev. 642, 651-52 (1876)) (hereinafter Lillquist, *Recasting Reasonable Doubt*). The point is that while some modern scholars assert that there is reason for extra protection in capital cases – in the form of a heightened standard of proof, *see supra* at 5 – the historical record reveals that the reasonable-doubt standard ***is*** the extra protection for capital cases.

III. There Is No Basis in Logic for Constitutionalizing Residual Doubt.

Guzek's argument here has a palpable inconsistency and illogic about it. The constitutional rule that Guzek advocates envisions a capital defendant asking a sentencing-phase jury to conclude that he may well *not* be guilty of the very crime for which the guilt-phase jury (oftentimes, of course, the very same jury) has already convicted him. In other words, the guilt-phase jury says "Guilty"; the sentencing-phase jury says, "Well, okay, maybe not." That is not a state of affairs worth encouraging, let alone constitutionalizing.

Guzek, of course, will presumably argue that there is no actual, logical inconsistency in his argument. A "residual doubt," he will say, is simply a doubt that exists between certainty "beyond a reasonable doubt" and absolute certainty. *See* Br. for Petitioner at 14, *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (No. 87-5546) (urging residual-doubt argument). And because to vote for conviction a juror need have only the former, the argument goes, it is at least theoretically possible that even a convicting juror could nonetheless harbor some residual doubt. There are two problems with that line of argument.

The first and most obvious problem is that any doubt that exists on the other side of the certainty "beyond a reasonable doubt" required for conviction is, by definition, *unreasonable*.[3] A "residual" doubt, that is, may well be "genuine," Jennifer R. Treadway, Note, *"Residual Doubt" in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 Case W. Res. L. Rev. 215, 229 (1992), and "real," Koosed, *supra*, at 56. Or, as the Fifth Circuit has noted, it may be "whimsical." *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981). What it is *not* is reasonable. A "reasonable" doubt is, as its label suggests, one "based upon 'reason.'" *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). A "residual" doubt – which, again, arises only beyond "reasonable doubt" – is, by contrast, "irrational," 19 *Oxford English Dictionary* 160 (2d ed. 1989) (defining "unreasonable"), "absurd, inappropriate, [and] incongruous," *Webster's Third New International Dictionary* 2507 (2002) (same). There are, amici recognize, a whole host of very good reasons why a juror might vote not to impose the death penalty. But an *unreasonable* doubt about a defendant's guilt – whether called residual, lingering, or whimsical – is not one of them.

[3] A "residual" doubt that *is* reasonable is not really residual at all; it is a stand-alone basis for acquittal, not just mercy.

The second logical problem with Guzek's argument arises because, as the Florida Supreme Court has famously pointed out, "[a] convicted defendant cannot be 'a little bit guilty.'" *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981). In the eyes of the law, either he did it or he didn't. That, of course, is why, upon a conviction, the jury's verdict pronounces the defendant "Guilty" of the charged offense – *not* "Guilty Beyond a Reasonable Doubt," but simply "Guilty." A "Guilty" verdict is not a philosophical abstraction. To the contrary, it embodies a real-world judgment – and signifies to the community – that the accused *in fact* was present at the scene, *in fact* intended to commit the charged crime, *in fact* carried out the act that constitutes that crime, and *in fact* caused the harm charged.

Now, it is of course true that a jury can convict – and pronounce a defendant "Guilty" in fact – even if it is not absolutely, positively certain of his guilt. But that is not because we as a society have concluded that it is okay to condemn innocent people. Rather, it is because we as a society have come to grips with the Enlightenment insight that perfect knowledge is oftentimes unattainable. The reasonable-doubt standard, in short, is the best we've got; it is "designed to exclude as nearly as possible" – in a real

and imperfect world – "the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979); *accord Winship*, 397 U.S. at 364 (reasonable-doubt standard requires "subjective state of certitude," "utmost certainty"). *See also* Lillquist, *Absolute Certainty*, *supra*, at 52-53 ("[O]ne of the primary assumptions of our present criminal justice system [is] that we are only convicting defendants in ordinary criminal cases upon the most exacting of proof standards.").

All of this is to say that, while the reasonable-doubt standard exists to guide the jury's determination of guilt, once the jury's determination is reduced to a verdict – and later memorialized in a court judgment – the law treats the defendant as "Guilty" *in fact*. The assertion that, in the abstract, there may be some philosophical "space" between certainty beyond a reasonable doubt and absolute certainty does not change the fact that a residual-doubt argument like Guzek's literally invites the jury to undo (or to ignore, or to compromise) its solemn verdict. Again, a "Guilty" verdict necessarily means, in a murder prosecution, that the defendant in fact (i) was there, (ii) intended to kill, (iii) committed the act, and (iv) caused the victim's death. To argue that the Eighth Amendment guarantees a defendant's right to ask sentencing jurors to conclude that, in retrospect, perhaps the defendant wasn't there – or didn't intend to kill, or didn't cause the death – is to make a mockery of the guilt-phase verdict and to "cast[] a shadow over the reliability and credibility of our legal system." *State v. McGuire*, 686 N.E.2d 1112, 1123 (Ohio 1997); *see also Report on the Governor's Commission on Capital Punishment* 147-48 (submitted to Illinois Governor George H. Ryan April 15, 2002) (residual-doubt argument would be "completely contradictory" to the facts underlying guilt-phase verdict).

Guzek's argument comes very close – if it does not go all the way – to constitutionalizing a defendant's right to invite the jury to lawlessness. It should be rejected.

IV. The Constitutionalization of Residual Doubt Would Entail Significant Societal Costs.

There is one practical point worth making. The rule that Guzek advocates – a uniform national requirement that all States permit capital defendants to make residual-doubt arguments to sentencing juries – would not come without costs. As an initial matter, Guzek's position poses a very real danger of juror confusion. What, exactly, is a juror to do when faced with (i) the knowledge that the defendant before him is indeed "Guilty" of the crime charged and (ii) an argument that, on second thought, perhaps the defendant isn't guilty, after all? Even setting aside the question whether the fine, philosophical distinction between guilt "beyond a reasonable doubt" and guilt in fact has any legitimate role to play here (*see supra* at 12-14), the strong likelihood is that at least some lay jurors just won't be able to grasp it. Many, we fear, will be left simply scratching their heads.

State lawmakers and judges, of course, make every effort to structure trial proceedings in such a way as to minimize juror confusion. *See, e.g.* Ala. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of ... confusion of the issues ... or misleading the jury ...."). And, traditionally, trial judges have been given discretion to control both their courtrooms and the evidence in a manner best calculated to avoid that confusion. *See, e.g.*, *United States v. Abel*, 469 U.S. 45, 54-55 (1984). Under Guzek's wooden rule, at least with respect to the confusion that would attend residual-doubt arguments, that flexibility would be no longer.

Second, there are very real societal costs to requiring a prosecutor who has already established a defendant's guilt during the (aptly named) guilt phase of a trial to re-establish it for purposes of sentencing: Yes, the defendant intended to kill; yes, the defendant committed the act;

yes, the defendant caused the victim's death; and (particularly relevant here) no, the defendant does not have an alibi. A prosecutor should not be made to re-try his guilt-phase case during the penalty phase just because a *convicted* defendant continues to believe – notwithstanding his conviction – that he can poke holes in it.

Obviously, this problem will be most acute in cases like this, where the guilt-phase and sentencing-phase juries are different (say, because there is a re-sentencing). Faced with a convicted defendant arguing to twelve *new* jurors that, in fact – and whatever the jurors before them might have thought – he didn't do it, a conscientious prosecutor would almost surely feel compelled to reconstruct his entire guilt-phase case to ensure that a full and fair factual picture was presented and that an appropriate sentence was pronounced. The problem, of course, is that doing so would entail, among other things, re-calling numerous witnesses – some of whose memories may have faded, others who may no longer be available to testify at all. Even where the guilt-phase jury will also determine the sentence, it is not hard to imagine that a prosecutor would not feel comfortable simply standing pat in the face of a defendant's continuing efforts to un-ring the bell of his conviction.

The point is that, in either case, having successfully made its case for guilt, the State should not be required to make it all over again at sentencing. A rule requiring as much risks draining scarce resources, both prosecutorial and judicial. Individual States, of course, are free to make that choice (and incur the costs) as a matter of policy; some do and will. But States should not have that choice foisted upon them as a mater of federal constitutional law.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Oregon Supreme Court.

Respectfully submitted,

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